Editor's note: Reconsideration denied by Order dated Nov. 9, 1998.

RALPH AND BEVERLY EASON
v.
BUREAU OF LAND MANAGEMENT

IBLA 94-526 Decided July 16, 1998

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer affirming a decision of the Vale, Oregon, District Manager assigning responsibility for maintenance of range improvements within the Jackies Butte Summer Allotment based upon licensed active preference. OR-030-84-7.

Affirmed in part as modified; vacated in part; reversed in part.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Base Property (Land)

   Under Departmental regulations, grazing preference was awarded an applicant commensurate with the carrying capacity of base property during the qualifying priority period. The Federal range was not classified but only the base property. Only base property may be properly described as "Class 1," while preference is stated in terms of AUM's, which are colloquially described as "Class 1" in reference to the base property for which the preference was granted.

2. Grazing Permits and Licenses: Generally

   If AUM's do not fall within the definition of a Class 1 AUM, they are not Class 1 AUM's, regardless of what the parties may have called them. The AUM's of grazing allowance which do not appear on dependent property survey records as part of Class 1 base property qualifications are not Class 1 AUM's.

3. Contracts: Construction and Operation: Generally--Evidence: Generally

   Documents sent between parties subsequent to signing an agreement are not conclusive as to the nature of the rights acquired under the agreement but are evidence of the parties' understanding of the agreement.

4. Grazing Permits and Licenses: Exchange of Use--Regulations: Generally--Taylor Grazing Act

The existence of a longstanding regulation allowing exchange-of-use agreements implies that it is within the Department's authority under the Taylor Grazing Act to exempt grazing, in the proper circumstances, from the payment of annual fees.

APPEARANCES: Steven J. Lechner, Esq., and William Perry Pendley, Esq., Denver, Colorado, for Appellants; W. Hugh O'Riordan, Esq., Boise, Idaho, co-counsel of record for Appellants; Donald P. Lawton, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Ralph and Beverly Eason have appealed an April 22, 1994, Decision by Administrative Law Judge Harvey C. Sweitzer affirming a May 30, 1984, Decision by the Vale, Oregon District Manager, Bureau of Land Management (BLM or the Bureau), apportioning responsibility for maintenance of range improvements within the Jackies Butte Summer Allotment based upon licensed active preference and assigning the Easons 5 percent of the responsibility for 15 projects and full responsibility for 4 projects. The Easons had challenged BLM's Decision on the grounds that it was contrary to a February 26, 1973, agreement between them and BLM. Following a hearing held in Ontario, Oregon, on June 23-24, 1988, Judge Sweitzer issued a Decision dated December 30, 1988. On appeal, this Board reversed that Decision and remanded the case to the Hearings Division because it had required the Easons to show that the District Manager's Decision was arbitrary, capricious, or contrary to law by substantial evidence, rather than a preponderance of the evidence. Eason v. Bureau of Land Management, 127 IBLA 259, 261-63 (1993). On April 22, 1994, Judge Sweitzer issued the Decision now before the Board.

I. Origin of the Appeal

The Jackies Butte Summer Allotment occupies approximately 212,000 acres in southeastern Oregon near the Idaho border. (Tr. 15.) Its eastern and northeastern boundaries are defined by the Owyhee River and the Owyhee River Canyon, while Crooked Creek forms part of its western boundary. The remainder of the boundary is shared with the Jackies Butte Winter Allotment (not at issue in this appeal) and the Antelope allotment. (Ex. 26.) Although areas near the northeastern side of the allotment tend to drain northeasterly or easterly toward the Owyhee River, drainages in the central area, constituting most of the allotment, flow northwesterly. (Tr. 17; Ex. 26.) As described at the hearing, the allotment provides considerable forage, but grazing is limited by the amount of water available for cattle; i.e., enough grass to support more animals than were being allowed on the allotment, but not enough water to support additional animals. (Tr. 77, 171.) Beginning in the 1940's, and possibly continuing

into the early 1960's, BLM had constructed reservoirs in the eastern and northeastern portions of the allotment, on drainages flowing toward the Owyhee River. (Tr. 77; Ex. 28.) To increase the availability of water in the central portion of the allotment, BLM began constructing reservoirs on the Dry Creek and Indian Fort Creek drainages. (Exs. 3, 4.) In developing the allotment, BLM planned to "shift" permittees from allotments with insufficient forage to Jackies Butte. (Tr. 79, 138, 171; Ex. 5, at 30-32, 36.)

Testimony did not identify precisely when BLM first became aware that the Easons held water rights on drainages within the Jackies Butte Allotment, but it was well aware of that fact when it was working on plans for water development in the late 1960's. (Tr. 76-78, 83.) The Easons initially filed a complaint with the Oregon State Engineer in 1965 and by 1967 they were seeking additional grazing as compensation for BLM use of their water. (Exs. 1, 2, at 9-10, 3, at 2, 5, at 28, 36, at 4.) Bureau personnel discussed the matter with the Easons, and negotiations were conducted primarily by Dean Stepanek, Area Manager until October or November 1972, and Marlyn Jones, Assistant District Manager. (Tr. 79, 89, 132-33, 151, 173, 191.) Neither testified at the hearing.

Although most BLM records of earlier meetings with the Easons have not survived (Tr. 153, 191-92), a series of meetings held during the months prior to February 26, 1973, the date BLM and the Easons signed an agreement to resolve the matter, are documented. On November 30, 1972, Frank Elfering, the Malheur County Watermaster, and Jerry Wilcox, Acting Area Manager, made presentations to the Vale District Grazing Advisory Board. (Tr. 132; Ex. 5, at 28-32.) Elfering explained that the Easons wanted the larger reservoirs drained, but he doubted that the water would reach their reservoirs, except during runoff season, and stated that the State Engineer was of the opinion that the water would be wasted. (Ex. 5, at 28.) Wilcox explained that, with the reservoirs, the unit is short of water and, without them, grazing reductions would be required. 1/ (Ex. 5, at 29.) As reported in the minutes, he discussed five alternatives:

> 1. Purchase the Water Rights. There is no guarantee the State of Oregon will approve purchase of rights.
>
> 2. Exchange Land for Water Rights. We can exchange for land but with the State block the problem is trespass. The same problem would exist with another block.
>
> 3. Trade Water Rights for Class I AUM's. Nothing in the regulations allow[s] this.

1/ At the hearing, BLM employee Perry estimated that the reduction would have been 8,883 animal unit months (AUM's), or 64 percent of the then available units. (Tr. 85.)

4. Install drain tubes and collars in each reservoir to facilitate draining the reservoir. The cost is 1 1/2 times cost of reservoirs and there is no guarantee there would be any water at all.

5. Do Nothing. Speaks for itself.

(Ex. 5, at 29; see Tr. 159, 172-73.) Wilcox also informed the Board that BLM had been negotiating with the Easons and that:

> Ralph Eason may agree to let BLM build all the reservoirs needed and maintain the present one in exchange for a 200 head license for 7 months in addition to what he now has. * * * The 200 head privilege could not be Class I. If for some reason either party wished to dissolve the agreement, the privileges would be lost. The Jackies Butte licensees will be asked to agree.

(Ex. 5, at 30.)

Sometime after the meeting, Wilcox and Jones had a conference call with Max Lieurance, Chief of Resources in the Oregon State Office and former Vale District Manager. (Tr. 134, 192.) Wilcox testified that Lieurance had advised that the AUM's be entered

> on his [the Easons'] dependent property survey, which was a form in the case files, that lists your qualifications and your base property, to show the increase there as Class 1 and just show it as a 1400-head increase and they would have to pay for it just like anybody else.

(Tr. 134-35.)

On December 20, 1972, Wilcox and other BLM personnel met with the allotment licensees to discuss water development on the allotment, granting the Easons 1,400 AUM's, and the possibility of shifting grazing from other allotments. (Tr. 92-93.) A BLM memorandum recording the meeting reports that Elfering was present and "presented a resume of the Eason water right complaints." (Ex. 33.)

Another meeting with the licensees was held on January 4, 1973, to discuss: "Eason's water rights, Jackies Butte Users Agreement to sanction Eason's 200 AU increase, and sequence of events for the Jackies Butte unit after a trade of use is signed with Easons." (Ex. 32, at 1.) George Gurr, the new Vale District Manager (Tr. 168-70), started the meeting by explaining that the district had a number of management problems and, without an agreement from the licensees, grazing could lose its priority and "emphasis on water developments and maintenance would be dropped." (Ex. 32, at 1.) Wilcox "discussed the 200 AU increase for [the] Easons and mentioned the sequence of events for moving additional use into the unit." Id. The minutes of the meeting report that Glenn Greke, one of

the licensees, "asked if [the] Easons were satisfied with what the BLM offered" and that, after they responded "Yes," "Wilcox explained the Trade of Use Agreement." Id. at 1-2. Maryln Jones explained that the Oregon State Watermaster would accept an agreement between BLM and the Easons "and that it would not require input from the other Jackies Butte users." Id. At some point, BLM distributed copies of a handwritten list of the five options discussed with the Grazing Advisory Board. Id. at 1; Ex. M; Tr. 273.

Wilcox reviewed the meetings with the licensees at a meeting of the Grazing Advisory Board on January 10, 1973. (Ex. 39, at 1.) Apparently, copies of a handwritten list of the five options were distributed. (Ex. N; Tr. 154, 161-62, 166.)

A third meeting with the allotment licensees was held on January 23, 1973, at which BLM distributed three documents. The first was apparently a draft of an agreement between the Easons and BLM. See Ex. 6, at 1, para. 4. However, there is no copy of this draft in the case file. The second was a statement signed by Gurr as District Manager stating that it was BLM's policy "to satisfy Class I demand" and that:

> In view of the Agreement with Eason to maintain and construct additional water structures in the Jackies Butte Unit, the Bureau plans a large investment to make available additional forage in excess of the Class I demand on the unit. However, prior to transferring any additional use into the unit, the Bureau of Land Management and the users will work out an acceptable allotment management plan and establish a management program for the wild free-roaming horses.

(Ex. 7, at 2.) The third document stated:

> We, the undersigned users of the Jackies Butte Unit, do not object to the Bureau of Land Management allocating Ralph and Beverly Eason 1,400 AUM's of additional qualifications for available forage in addition to their present base property qualifications.
>
> In return for this consideration, [the] Easons agree to allow the Bureau of Land Management to construct and maintain as many water structures as may be necessary for proper management of the Jackies Butte Unit on which they control the water right.
>
> In addition, [the] Easons will so notify the State Engineer and will interpose no further objection to Bureau of Land Management construction or water use.

(Ex. 7, at 3.) After some discussion, the allottees asked BLM personnel to leave the room so they could discuss the document among themselves. (Ex. 6, at 3.) Apparently, they were concerned about the consequences of

shifting other grazers into the unit. (Tr. 98, 262-63, 281-82.) When BLM personnel returned about 30 minutes later, two handwritten paragraphs had been added:

> However, prior to transferring any additional use onto the unit, the Bureau of Land Management and the users will work out an acceptable allotment management plan.
>
> Any additional cattle brought into the unit, with the exception of the Eason AUM's will not affect the priorities of the present users.

(Ex. 7, at 3.) All members of the group, except Eason, signed the modified document at the meeting. (Exs. 6, at 3, 7, at 3.) Ralph Eason was ill and not present but signed after consulting his attorney. (Tr. 278.) By memorandum dated February 1, 1973, Lieurance, then Acting State Director, advised the Vale District Manager: "The agreement appears to cover the basic issue of an agreement with the other range users to allow the additional 1400 AUMs to Eason in exchange for his authorization for the Bureau to infringe on his water right as necessary to provide adequate water." (Ex. 38; see Tr. 178-79.)

On February 26, 1973, the Easons and BLM District Manager Gurr signed the agreement which has become the subject of the present appeal. Designating BLM as the first party and the Easons as the second, it provides:

> (1) That the SECOND PARTIES agree to permit the FIRST PARTY to construct and maintin [sic], at its own expense, as many water structures and developments as may be necessary for proper management of the Jackies Butte Unit on which the SECOND PARTIES control the water right. That the water rights of the SECOND PARTY are on and adjacent to the Jackies Butte Unit, Vale District, and the FIRST PARTY wishes to construct and maintain the water structures and developments as may be necessary for proper management on drainages to improve and benefit the Jackies Butte Unit.
>
> (2) The FIRST PARTY, in consideration of the SECOND PARTIES' consent to the construction and development set forth in paragraph (1) hereof, does agree to grant the SECOND PARTIES 200 AUM's for 7 months (1400 AUM's) in addition to their present 434 Class 1 AUM's within the Jackies Butte Unit.
>
> (3) The additional 1400 AUM's above mentioned will be allowed after completion of sufficient water development work to benefit the Jackies Butte Unit. It is the intention that such work will be completed on or before April 1, 1974, but in the event for any reason said work is not completed, then an allowance of additional AUM's will be made to the SECOND PARTY commensurate with the work that is completed by that date and

> thereafter additional allowances will be made as work is completed until the full 1400 AUM's have been allowed; a minimum of 350 AUM's will be allowed, April 1, 1973; 700 AUM's, April 1, 1974; 1050 AUM's, April 1, 1975; and full 1400 AUM's, April 1, 1976.
>
> (4) The additional 1400 AUM's to be allowed to the SECOND PARTY within the Jackies Butte Unit will be permanent as long as the FIRST PARTY requires water for domestic livestock within said Jackies Butte Unit and will be the last allowance to be cut or diminished in said Unit; this is a trade of use and no license fee will be charged SECOND PARTY for said 1400 AUM's.
>
> (5) The parties agree that an acceptable Allotment management [sic] Plan will stipulate turnout and gathering dates for the Jackies Butte Unit subject to AMP flexibility. Season of use within the Unit will be April 1 to October 31 of each year.

(Ex. 7 (hereinafter cited as the "February 26 Agreement").) On March 3, 1973, Gurr issued a "Notice of Final Advisory Board Recommendation and Decision of District Manager" incorporating the terms of the February 26 Agreement and notifying the Easons and other affected parties of their right to appeal. (Ex. 8; Tr. 163.)

The Easons did not appeal, and for several years the documents related to their annual grazing authorizations listed the AUM's received under the agreement as "trade of use" and, like the exchange-of-use rights they held, were noted as incurring no charge. (Ex. 25; Tr. 39-43.) When Fearl M. Parker became District Manager in July 1976, and learned of the agreement, he questioned whether it had been within the District Manager's authority to agree to its terms. (Parker Dep. at 10, 15-16.) 2/ He discussed the agreement with Elfering and various BLM personnel and allottees and sought clarification from the Oregon State Office and the Office of the Regional Solicitor. (Parker Dep. at 16-29, 33-34; Exs. D, F, G.) He believed the agreement to be invalid because it traded Federal grazing rights for use of the Easons' water rights and allowed grazing without payment of grazing fees. (Parker Dep. at 119, 122-23, 126-28, 161, 186, 203.) By memorandum dated February 28, 1977, the Oregon State Office advised him:

> It remains the opinion of the Regional Solicitor that there is no regulatory or statutory basis for allowing 1,400 AUMs of free use in the Jackies Butte Allotment. Therefore, you should not issue a license based on the agreement for the 1,400 AUMs in the Jackies Butte Unit for the 1977 grazing season. If unauthorized grazing use of the Federal range is made with the

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2/ A transcribed prehearing conference was held Oct. 18, 1984, at which the parties agreed to depose Parker and Ray Monroe, the Southern Malheur Resource Area Manager at the time the Decision was issued. (Prehearing Conf. Tr. 57.) The depositions were taken Dec. 11 and 12, 1984.

1,400 AUMs do not take trespass or other action until such time as further directed by this office.

(Ex. I.) Following receipt of the memorandum, BLM did not include the AUM's in grazing applications and licenses issued to the Easons, although they appear to have continued to utilize the 1,400 AUM's along with their grazing preference. (Tr. 56; Parker Dep. at 136-37; Ex. 25; see Parker Dep. Exs. 14, 20.)

The situation remained unchanged for several years as BLM attempted to obtain an opinion from the Regional Solicitor. (Exs. H, K; Parker Dep. Exs. 20-24, 26-27.) In 1980, BLM resumed listing the AUM's in billing statements and in 1983 the State Director issued an administrative decision authorizing the Vale District Manager "to continue to issue the Easons a license and to consider their grazing use, (limited to 200 animal units [AU's] and 1,400 AUMs), as a recognized privilege when making future forage allocations." (Ex. 17; Parker Dep. at 211-12.)

In 1982, BLM revised its policy on rangeland improvements and began to assign responsibility for maintenance costs to the beneficiaries as a condition of their grazing licenses. (Tr. 21-22; Ex. 14, Encl. 1, at 6-7; Monroe Dep. at 23-24, 58; Parker Dep. at 224-25; see Ex. O.) The Easons refused to sign a maintenance agreement and on November 8, 1983, BLM issued a proposed Decision imposing terms upon them. 3/ (Parker Dep. at 239-40.) In response to their protest, Parker, as District Manager, issued the May 30, 1984, Decision which was the subject of the hearing before Judge Sweitzer. It informed the Easons that BLM considered the 1,400 AUM's to be a "trade of use" rather than "preference." (Ex. 29, at 2.) It noted that they had been assigned full maintenance responsibility for the Skull Creek Pasture because it "is your individual use area and contains no water projects related to the February 26, 1973 agreement." Id. Regarding the remainder of the allotment, the Decision stated that the Easons' share of maintenance had been based upon their 719 AUM active preference but that BLM would "undertake your share of this maintenance responsibility which is directly related to those water projects which were developed in accordance with the February 26, 1973 agreement." Id. It also noted that the proposed Decision had been modified by eliminating the Jackies Butte pipeline

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3/ Although the proposed decision was part of the record at one time (Parker Dep. at 252), it is not in the files submitted to the Board. Exhibit 24 is a proposed decision issued to Marvin Easterday, one of the common allottees. In addition, the two Decisions BLM issued on May 30, 1984, separately addressing the Jackies Butte Summer and Winter Allotments, acknowledge that the Easons had filed a protest and statement of reasons (SOR) on Mar. 15, 1984, but those documents are not included in the files. The Easons withdrew their appeal of the Decision concerning the winter allotment pursuant to stipulations between the parties. (Prehearing Conf. Tr. 40-43; Order of June 6, 1985.)

because "it is supplied from a reservoir within the 1973 agreement area," but that the Easons would be responsible for maintenance of the China Gulch well and pipeline system "which is also within the 1973 agreement area, but is ground water related." Id.

II. Judge Sweitzer's Decision

After making findings of fact, Judge Sweitzer first addressed the question whether the 1,400 AUM's granted by the February 26 Agreement were Class 1. He noted that the agreement does not use the term "Class 1" and noted that "[t]he reference in paragraph 4 to `trade of use' relied upon by BLM can as easily be construed as an alternative form of user fee (other than money) rather than as a separate class of AUMs." (Decision at 8.) He concluded that the circumstances in which the agreement was signed weighed in favor of finding that the AUM's are Class 1, but that doing so would be "clearly contrary to the plain language of the agreement." Id. In particular, he concluded that the 1,400 AUM's are unlike Class 1 AUM's in that the Easons do not pay grazing fees, the AUM's are not subject to proportionate reductions in use, and "they may be cancelled whenever BLM determines it does not need the Easons' water for domestic livestock on the range." Id. at 8-9. Judge Sweitzer also found that "labelling the 1,400 AUM's as standard Class 1 AUMs, with attendant preference rights, is clearly contrary to the construction placed upon the agreement by the parties," who "consistently treated the 1,400 AUMs differently than the Easons' Class 1 AUMs, excluding the former, but not the latter, from calculations of the Easons' grazing preference." Id. at 9. Accordingly, he held that the preponderance of the evidence did not support the Easons' claim that the 1,400 AUM's are Class 1. Id.

Judge Sweitzer addressed two other issues raised in the present appeal: the first was whether the February 26 Agreement made BLM responsible for maintenance expenses associated with groundwater structures and structures outside the watersheds where the Easons' water rights are located. Concerning this first issue, he found that the February 26 Agreement is ambiguous and that "drainages" in the first paragraph of the agreement "suggests, but does not compel, a finding that maintenance of only surface water structures is contemplated." Id. at 10. Judge Sweitzer noted that only "Mrs. Eason testified that the agreement imposed this responsibility upon BLM" and she had reached the conclusion "only after her attorney advised her that it did so." Id. He concluded that the "responsibility was not something the Easons bargained for," but had come from a change in "BLM policy requiring BLM to assume responsibility for maintenance of all water structures" and that "Mrs. Eason may have confused BLM policy at the time with what was intended by the agreement." Id. Judge Sweitzer held that the evidence indicated "that BLM and the Easons were contemplating the construction and maintenance of reservoirs only." Id.

In addition, Judge Sweitzer held that the February 26 Agreement did not prohibit BLM from constructing water structures and developments after 1976. Id. Appellants object to the ruling because the issue was

not ripe and was not among those stipulated by the parties and addressed by them. (SOR at 36-37; Tr. 4-5.) They request that it be vacated. (SOR at 10.) The BLM agrees that "the question of the construction of additional water structures was not properly before the ALJ because it was not part of the decision being appealed from" and that the ruling is "merely dicta." (Answer at 2 n.1.) The Appellants request is granted and the finding is vacated.

III. Arguments

Appellants argue that Judge Sweitzer erred in ruling that the 1,400 AUM's are not Class 1. They assert that "[t]he Agreement is ambiguous with respect to whether the 1,400 AUMs are Class 1 AUMs" and, under contract law, should be construed by examining extrinsic evidence as to the intent of the parties. (SOR at 11.) They rely upon the testimony of Beverly Eason that the couple intended to obtain Class 1 AUM's. They also argue that BLM intended for the AUM's to be Class 1. Id. at 13. Appellants point out that trading water rights for Class 1 AUM's was one of the alternatives Wilcox discussed with the Grazing Advisory Board on November 30, 1972, and they argue that his concern about whether Class 1 AUM's could legally be granted were resolved by the conference call with Lieurance. Id. at 14-15. They claim that "Lieurance advised * * * that granting the Easons Class 1 AUMs would be legal" and contend that "from that moment on, the BLM intended to grant the Easons Class 1 AUMs." Id. at 15. Appellants believe this intent was carried into the January 4 meeting with the allottees at which "there was a verbal agreement with Jackies Butte users to trade Class 1 AUMs for the use of the Easons' water rights," the January 10 meeting with the Grazing Advisory Board, and the January 23 meeting at which the allottees signed their agreement. Id. at 15-17.

Appellants present three other arguments to support their claim that the parties intended the AUM's to be Class 1. First, they contend that only Class 1 AUM's could be legally granted under the regulations in effect in 1973 and satisfy BLM's intent to make the agreement legal. Id. at 20-23. Second, they argue that the words "in addition to" in the agreement indicates that the 1,400 AUM's were to be added to the Easons' Class 1 AUM's. Id. at 23-24. Third, they argue that the second paragraph added to the January 23, 1973, Jackies Butte Users Agreement and testimony by its signatories indicates that the other licensees understood that the AUM's would be Class 1. Id. at 24-29.

Appellants argue that the February 26 Agreement is not ambiguous in requiring BLM to maintain "all `water structures and developments.'" (SOR at 30.) They note that the agreement does not limit "water structures and developments" to surface water and argue that the agreement "evidences that the parties intended for the term `water structures and developments' to apply to all water structures and developments, including ground water structures and developments, on the Jackies Butte Unit." Id. Appellants further argue that, if the provision is ambiguous, Beverly Eason's testimony and other evidence establishes that the parties intended the phrase

to include groundwater structures and developments. Id. at 30-33. Appellants, however, contend that the agreement is "ambiguous with respect to whether it applies to all water structures and developments" or only "those water structures and developments * * * which are located within the watershed on which the Easons own water rights." Id. at 34. They believe that Eason's testimony establishes that the parties intended the agreement "to apply to all water structures and developments on the Jackies Butte Unit." Id. at 34-36.

The BLM defends Judge Sweitzer's conclusion that the AUM's were not Class 1. It argues that the use of "in addition to" in the agreement does not require finding that the AUM's are Class 1 because the phrase can mean "besides" as well as "added to." (Answer at 6.) The BLM points out that the agreement does not refer to the 1,400 AUM's as Class 1 but "trade of use" and argues that testimony shows that the term was used to denominate a separate class of AUM's which, as defined in the agreement, do not have several characteristics of Class 1 AUM's. Id. at 6-8. The BLM also contends that testimony shows that it had studied the possibility of granting Class 1 AUM's, but that does not establish an agreement that the AUM's would be Class 1. Id. at 8-10. The BLM points out, as did Judge Sweitzer, that subsequent billing and grazing preference statements did not identify the 1,400 AUM's as Class 1 and the Easons did not object or appeal. Id. at 11-13. Additionally, BLM argues that a 1978 Memorandum of Agreement (MOA) between BLM and the Easons, after a land exchange between BLM and the State of Oregon, changed the Easons' Class 1 AUM's from 434 to 719, showing that "only a few years after execution of the 1973 Agreement the parties did not consider the 1,400 AUM's to be part of the Class 1 privilege." Id. at 11. The BLM also responds to the Appellants' arguments concerning the testimony and other evidence. Id. at 14-19.

In regard to maintenance expenses, BLM contends that the "clear wording" of the first paragraph of the February 26 Agreement is that "the Easons are permitting the BLM to `construct and maintain water structures and developments' for management of the Jackies Butte Unit on which the Easons `control the water rights.'" Id. at 20. The BLM argues that "the Agreement was made to resolve the Easons' claim that BLM was interfering with their surface water rights and there is no indication in the record that ground water was a consideration * * *." Id. The BLM also argues that the phrase "proper management on drainages" indicates "that only the maintenance of surface water structures was contemplated" as does testimony by the witnesses. Id. at 20-21. The BLM also argues that it would have made no sense "to enter into an agreement under which the Easons permitted the BLM to build and construct structures outside their watershed since such construction could not have been in conflict with their water rights." Id. at 22. It points out that, except for Beverly Eason, the testimony "indicated that the agreement had nothing to do with water structures and developments outside the Easons' watershed." Id. at 22-23.

IV. Standards of Review

As Appellants note, the hearing before Judge Sweitzer was held under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1994), and

was an adjudication "required by statute to be determined on the record after opportunity for an agency hearing" under 5 U.S.C. § 554(a) (1994). Eason v. Bureau of Land Management, supra, at 261, citing Bureau of Land Management v. Ericsson, 98 IBLA 258, 263 (1987). Appellants assert that 5 U.S.C. § 557(b) (1994) requires the Board "to review the decision of Judge Sweitzer de novo" and therefore "must accord no deference to Judge Sweitzer's findings of fact and conclusions of law." (SOR at 8.) The BLM disagrees with the latter assertion, at least as it concerns the Judge's findings based upon his assessment of the demeanor and credibility of witnesses who gave conflicting testimony. (Answer at 4-5, citing United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973).)

The Board has been delegated authority to conduct de novo review of any appeal. United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983). Because that authority is exercised in this appeal, there is no need to address the Appellants' claim that the Board is required to do so. Nor, given the resolution of the issues presented below, is there any need to determine whether to defer to Judge Sweitzer's findings based upon the demeanor and credibility of witnesses. See United States v. Feezor, 130 IBLA 146, 200-201 (1994).

V. Class 1 AUM's

A major portion of Appellant's SOR addresses Appellants' contention that Judge Sweitzer erred in ruling that the AUM's granted by the February 26 Agreement are not Class 1. Resolving the issue Appellants raise requires understanding the meaning of the term "Class 1." Prior to enactment of the Taylor Grazing Act on June 28, 1934, the public domain was used for grazing without restriction and without regulation by the Federal Government. See Buford v. Houtz, 133 U.S. 320, 326 (1890). "[I]n order to promote the highest use of the public lands," the Act authorized the Secretary of the Interior to establish grazing districts, to "make provision for the protection, administration, regulation, and improvement of such grazing districts," and to issue "permits to graze livestock on such grazing districts * * * upon the payment annually of reasonable fees." Ch. 865, §§ 1-3 48 Stat. 1269, 1269-70 (1934), codified as amended at 43 U.S.C. §§ 315, 315a, 315b (1970). Section 3 of the Act requires that "preference" in issuing grazing permits be given "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them * * *." Id. at 1271, codified as amended at 43 U.S.C. § 315b (1970).

Grazers who had been using the Federal range were allowed until June 28, 1938, to apply for a permit to use land within a grazing district, although deadlines were extended for many districts. 3 Fed. Reg.

604 (Mar. 22, 1938); see 43 C.F.R. Part 501 (1940); 4/ Walter K. Ellis, 57 I.D. 113, 115 (1940). Applicants were required to identify their "base property," defined as their "[p]rivately owned or controlled land or water used in range livestock operations * * * for which a grazing privilege is sought * * *." 43 C.F.R. § 501.2(d) and (e) (1940). Base properties were assigned one of three classifications:

> Class 1. Forage land dependent by both location and use, and full-time prior water.
>
> Class 2. Forage land dependent by use only, and full-time water.
>
> Class 3. Forage land dependent by location only, and full-time water which otherwise would be in class 2 but which was developed later than other water servicing a part or all of the same area.

43 C.F.R. § 501.4 (1940); see Solicitor's Op., 56 I.D. 62 (1937). 5/ "Land dependent by location" was defined as "forage land within or in the immediate neighborhood of the Federal range which is so situated and of such character that the conduct of economic livestock operations requires the use of the Federal range in connection with it." 43 C.F.R. § 501.2(h) (1940). "Land dependent by use" was "forage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any 3 years or for any 2 consecutive years in the 5-year period immediately preceeding [sic] June 28, 1934 * * *." 43 C.F.R. § 501.2(g) (1940).

[1] Of importance to the present appeal, "the Federal range is not classified, but only the base properties of applicants for grazing licenses." Estate of J.N. Wells, 57 I.D. 213, 214 (1940). Under the regulatory system established by the Department, only base property may

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4/ The regulations underwent a series of modifications as the Department developed a program for adjudicating applications and issuing permits. See Brooks v. Dewar, 313 U.S. 354, 361 (1941); E.L. Cord, 64 I.D. 232, 233-34 (1957). Those first promulgated addressed issuance of temporary licenses under section 2, 43 U.S.C. § 315a (1996), and leases under section 15, 43 U.S.C. § 315m (1996). See Joseph R. Livingston, 56 I.D. 92, 95 (1937). For convenience, citations to the early regulations are to the 1940 edition of the C.F.R.

5/ The statute and regulations refer to classification based upon land or water and, except under special rule, one or the other was chosen as base property in each grazing district. See Thomas Ormachea & Michael P. Casey, 73 I.D. 339, 346 (1966); William Sellas, Grazing Dec. 677, 681 (1958); Art L. Murray, Grazing Dec. 443, 446 (1946); Fine Sheep Co., 58 I.D. 686, 691 (1944). Testimony at the hearing indicated that water was not used as base property in Oregon. (Tr. 71.)

be properly described as "Class 1," while an allottee's "preference" is stated in terms of AUM's. Although ownership of base property was necessary to qualify for a grazing permit, use of the property was the basis for adjudicating the grazing "preference" awarded the applicant. See 43 C.F.R. § 501.2(e) (1940); Public Lands Council v. U.S. Department of the Interior, 929 F. Supp. 1436, 1440 (D. Wyo. 1996); Tr. 64-65; Monroe Dep. at 11; Parker Dep. at 90-91, 102-03. The amount of "preference" was "commensurate" with the carrying capacity of the base property during the qualifying priority period. McLean v. Bureau of Land Management, 133 IBLA 225, 232 (1995); Arthur V. Heller, 66 I.D. 65, 68 (1959); James G. Brown, 65 I.D. 394, 395-96 (1958). "Carrying capacity" was "[t]he amount of natural or cultivated feed grown or produced on a given area of forage land in 1 year, measured in animal unit months," which is defined as "[t]hat amount of natural, cultivated, or complementary feed necessary for the complete subsistance of one cow for a period of one month." 43 C.F.R. § 501.2(i), (j) (1940); see Fine Sheep Co., 58 I.D. 686, 689-93 (1944).

There is no reason to doubt that the Easons intended to obtain, as one witness put it, "all the amenities of being part of the class 1 preference." (Tr. at 243.) As Appellants note, Beverly Eason testified that early in discussions with BLM "very specifically, we said they had to be Class 1" and mentioned the matter at subsequent meetings. (Tr. 260, 268, 276-77.) There is also evidence that BLM considered granting Class 1 AUM's. The minutes of the November 30, 1972, Advisory Board meeting, the handouts BLM presented at the meetings with the Advisory Board and licensees, and Wilcox's testimony establish the point. (Exs. 5, M, and N.)

As described by Wilcox, BLM was concerned with whether any grant of AUM's would be "legal in terms of what the regulations allowed for because nothing in the regulations * * * hit on trading of whatever, water for grass or whatever you want to call it." (Tr. 134, 147, 149, 172-73.) Wilcox testified that Lieurance advised entering additional Class 1 AUM's on the Easons' dependent property survey as part of their qualifications for their base property. (Tr. 134-35.) The advice was practical, not legal. 6/ In 1973, the regulatory definition of base property had not changed, but its classification had been simplified to Class 1, dependency by use, and Class 2, dependency by location. 43 C.F.R. § 4111.2-1(b) (1972). 7/ Of course, no provision allowed trading "water for grass,"

6/ Testimony indicated that BLM had sought advice from Riley Nichols in the Solicitor's Office in Boise. (Tr. 94-95, 178.) He reportedly told BLM that it could not trade Class 1 grazing rights for use of the water. (Tr. 94-95, 116-17.) Nichols was deceased at the time of the hearing and a search of records in the Boise office failed to find any documents related to the case. (Tr. 135-36.) Parker stated that in 1977 he was advised in writing by the Solicitor's Office that there was no authority to issue AUM's without requiring payment of grazing fees. (Parker Dep. at 98-99, 143-44, 159, 203.) The document is not part of the record.

7/ "Land dependent by use" was defined as

"forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the

but Lieurance recognized that AUM's could be issued to the Easons by simply making them part of their base property qualifications and thereafter treating them like other Class 1 AUM's, subject to the additional contractual provisions concerning reductions and the payment of grazing fees. (Tr. 135; see 43 C.F.R. §§ 4110.0-5(k), 4111.4-3, 4115.2-1(k) (1972).) Nevertheless, as Wilcox also testified, Lieurance "was cautious that at some point in time, this thing may blow up, blow up in terms of the legality involved in it." (Tr. 135.)

Wilcox agreed that Lieurance's call had been important but did not say that it had resolved BLM's concerns. (Tr. 148.) As he explained, when he became acting Area Manager in October or November of 1972, the previous Manager had already reached an agreement with the Easons regarding the 1,400 AUM's and his job "was basically to negotiate an agreement with the users of Jackies Butte on [the] Easons' agreement." (Tr. 132; see Ex. 5, at 30.) His particular concern was that the other allottees could appeal any agreement with the Easons which called for issuing additional AUM's for the common allotment. (Tr. 92-93, 100, 132.) 8/ Pending a written agreement with the other licensees, negotiations with the Easons had effectively stopped. (Tr. 144-46, 148.)

Wilcox moved from the Vale District on Superbowl Sunday 1973. (Tr. 131-32.) At that time he understood that, after the January 4, 1973, meeting, "we thought basically we had them in agreement. We just hadn't hammered out a written one yet and gotten their signatures, but we felt that we could get that within a very short time." (Tr. 145.) Concerning the Easons, he stated: "[v]erbally, we had the 1400 AUMs hammered out but we still didn't have a written one with them." Id. Asked about "what those 1400 AUMs were supposed to be," Wilcox testified:

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fn. 7 (continued)
Federal range in connection with it and which, in the `priority period,' was used as a part of an established, permanent and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the Federal range."
43 C.F.R. § 4110.0-5(m)(1) (1972).

8/ Appellants incorrectly state that the 1,400 AUM's would result in reductions of use by other allottees. (SOR at 14 n.11.) Reductions would have been required if the reservoirs could no longer be used (Tr. 85; Ex. 5, at 29), and the Feb. 26 Agreement provided that the 1,400 AUM's would "be allowed after completion of sufficient water development work to benefit the Jackies Butte Unit" and established a schedule by which the AUM's would be increased commensurate with the work completed. (Ex. 7, at 1; Tr. 207.) Judge Sweitzer accepted the Appellants' argument: "The trade of AUMs to the Easons would necessitate an initial commensurate reduction in the AUM's available to the other permittees." (Decision at 4.) The Decision is modified by striking that sentence.

> At that point in time, when I left, the 1400 AUMs would be paid for. Now, this wasn't an agreement with [the] Easons. This is BLM's, where we thought we were. We had the 1,400 AUMs. They would pay for them and they would be Class 1.
>
> Q They would be pure Class 1, just like any other Class 1's?
>
> A Class 1. And in turn or in trade for their water.
>
> * * * * * * *
>
> A Yes, let me rephrase. The 1400 AUM's, they would pay for but whether it's Class 1 or Class 2 or whatever, as far as what our decision was in the District, after the input from Max Lieurance, was still hanging there. So let me correct myself, when I say it's Class 1. It was still hanging there.

(Tr. 145-46.) Wilcox also knew that the Easons wanted something "better than Class 1" in that they were "adamant" their 1,400 AUM's would be the last to be removed from the range in case of a reduction, and he recognized this was different from what Lieurance had recommended. (Tr. 136, 149.) He did not remember the Easons using the term "Class 1," but he had not negotiated with them. (Tr. 149-51.)

Rather than establishing that "BLM intended to grant Class 1 AUMs" after the conference call with Lieurance (SOR at 15), Wilcox's testimony indicates only that he believed there was a way BLM could issue Class 1 AUM's subject to the payment of grazing fees. On cross-examination, he stated: "You had to have something as far as the Bureau was concerned when you traded the water for the grass to make it halfway legal; and one way of doing it is simply making it Class 1." (Tr. 149.) The Easons and BLM had resolved the number of AUM's to be issued, the Easons having initially wanted "considerable more than that" (Tr. 276), but a written agreement had not been reached. Nor had the licensees signed an agreement precluding a "blow up" challenging the legality of granting additional AUM's. Wilcox's task was to work out an agreement with them and negotiations with the Easons were suspended until he did. There is no reason to doubt that BLM considered issuing Class 1 AUM's, but Wilcox had not negotiated with the Easons, did not know what they believed they would receive, and knew that they wanted protections superior to Class 1. Negotiations with the Easons did not resume until after he moved from the district and they were not completed until February 26.

Wilcox's testimony supports Appellants' claim that after the January 4 meeting the Easons and BLM were "basically" in agreement. 9/ (Tr. 145.)

9/ The Jan. 4 "verbal agreement" with the allottees that "BLM intended for the AUM's in the Jackies Butte Users Agreement to be to [sic] Class 1 Aum's" (SOR at 17) has little bearing in light of the subsequently signed

Appellants appear to borrow the term "verbal agreement" from the minutes of the January 10 meeting of the Grazing Advisory Board which report that Wilcox said the licensees had "brought out a number of points to be considered in the proposed plans for water development and shifting of use. A signed agreement has not been reached, although there is a verbal agreement as far as Ralph Eason's 200 head privilege is concerned." (Ex. 39, at 1.) Like Wilcox's testimony, the minutes indicate only that the licensees had given their assent to BLM issuing 1,400 AUM's, without identifying the class of the AUM's being given.

The Appellants also claim that the January 23 Agreement among the licensees refers to Class 1 AUM's and required BLM to issue Class 1 AUM's to the Easons. In support, they rely on a handwritten list of options distributed at the licensees January 4 meeting. (SOR at 15; Reply at 17; Tr. 273-74.) The document, Exhibit M, lists the five alternatives which appear in the minutes of the November 30, 1972, Grazing Advisory Board meeting (Ex. 5, at 28), quoted above, but without the commentary. Larry Perry, a range technician in the Central Resource Area, testified that the list had been drafted in a meeting among BLM personnel. (Tr. 76, 79, 81.) He identified the handwriting on the first page of Exhibit 36 as Fritz Rennebaum's and the interlineated notes as Wilcox's handwriting. (Tr. 82.) The handwriting on the first page of Exhibit M is the same style as Exhibit 36, without the interlineation, and that Exhibit appears to be identical to Exhibit N, which was also passed out at the January 10 Grazing Advisory Board meeting. Each includes as item 3: "Trade Water Rights for Class I AUM's." 10/

Appellants also argue that the second handwritten paragraph added to the January 23 Agreement shows that the licensees "understood that the 1,400 AUM's would be Class 1 AUMs." (SOR at 26.) As explained by Beverly Eason, the licensees understood that grazing rights transferred into the

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fn. 9 (continued)
contract. See the discussion of the doctrine of integration of contracts, 17A Am. Jur. Contracts §§ 396-98 (1991). The minutes of the Jan. 4 meeting do not mention Class 1 AUM's or that an agreement had been reached. Instead, they state that "Wilcox explained the Trade of Use agreement." (Ex. 32, at 2.)

10/ BLM understands the wording "Trade Water Rights for Class I AUM's" to mean that the option under consideration was to have the Easons surrender their water rights in exchange for Class 1 AUM's and argues that, "[i]f the United States received no water rights from the Easons, then there is no reason to conclude" that the Exhibits are "strong evidence that the Easons received Class 1 AUMs as preference in return." (BLM Answer at 16, 25-26; see Reply at 19-20.) There was no testimony directly addressing the meaning of the option, but BLM's description is consistent with the first two options listed, purchasing the Easons' water rights and trading land for them. See Tr. 81-82, 275.

Jackies Butte Unit would be treated on par with theirs if reductions in grazing were required. (Tr. 282.) The allotment users wrote the paragraph to protect themselves by making any additional AUM's transferred into the Unit "shifted AUM's" rather than Class 1, so that the subsequently added AUM's would be the first removed if the range deteriorated, and less entitled to an increase if range conditions improved. (Tr. 282-83.) The words "with the exception of the Eason AUM's" were added, she explained, so that the 1,400 AUM's being granted to the Easons would not be treated as "shifted AUM's." (Tr. 283.) Appellants believe that this exception shows the licensees understood the 1,400 AUM's were to be Class 1. (SOR at 25-26.)

VI. ANALYSIS

At this point it is appropriate to note that three agreements were entered into to resolve the problem which arose when BLM began appropriating the water belonging to the Easons for the use and benefit of the Jackies Butte Unit. The first was the January 23, 1973, agreement between BLM and the allottees with livestock in the Jackies Butte Summer Allotment (including the Easons) that, if the allottees agreed to the grant of 1,400 AUM's to the Easons, the Easons would make the water available to all of the allottees in the Jackies Butte Unit, and BLM would undertake the construction of facilities necessary to convert use of that water from irrigation farming to cattle raising. (Ex. 7.) The parties entered into this agreement before the agreement between the Easons and BLM was finalized because BLM and the Easons were of the opinion that no agreement between them was possible if the other allottees did not agree to the grant of 1,400 AUM's in settlement of the dispute over the BLM appropriation of the Easons' water. This agreement attached certain obligations to the AUM's (to continue only as long as the water was made available, and to terminate when the water is no longer being used for livestock watering in the allotment) and granted certain priorities to the AUM's (priority over the AUM's issued to the agreeing allottees and all future allottees, and a waiver of the usual fees for use).

The second agreement, entered into on February 26, 1973, has been quoted above at some length. It was viewed by Beverly Eason as a side agreement between BLM and the Easons. In the first numbered paragraph, the Easons' ownership of water rights in and adjacent to the Jackies Butte Unit was recognized, and the Easons granted BLM the right to divert and use the water subject to those water rights. As consideration for the use of the water, BLM agreed to grant 1,400 AUM's in addition to the Class 1 AUM's the Easons held in the Unit. This agreement imposed additional restrictions on the 1,400 AUM's in the form of a phased-in grant of AUM use, dependent upon BLM's completion of "sufficient water development work to benefit the Jackies Butte Unit."

The third "agreement" was the March 7, 1973, "Final Advisory Board Recommendation and Decision of District Manager." (Ex. 8.) This decision was issued by BLM after approval by the Grazing Advisory Board, and

accepted and adopted many of the terms and conditions of the January 23, 1973, agreement between and among the various allottees in the Jackies Butte Unit and the February 26, 1973, agreement between BLM and the Easons. In some respects, this is the most important document of the three. This document expressed the Easons' agreement to "impose no further objections to the Bureau of Land Management effort to construct or maintain as many water structures and developments as may be necessary for proper management of the Jackies Butte Unit on drainage on which [the Easons] have an adjudicated water right." Id. In return for this consideration, BLM granted 200 AU's (1,400 AUM's of forage), and agreed that "these additional 1,400 AUM's allowed within the Jackies Butte Unit will be permanent so long as the Bureau of Land Management requires water for domestic livestock within the Jackies Butte Unit. This is a trade of use and no license fee will be charged for the 1,400 AUM's." Id.

The determination regarding whether the AUM's granted to a particular party are "Class 1" is a legal determination, dependent upon how the grazing user qualifies for receipt of those AUM's. The Tailor Grazing Act authorized the Department to issue:

> permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time.

Ch. 865, §§ 1-3, 48 Stat. 1269, 1270 (1934), codified as amended at 43 U.S.C. §§ 315b (1970). Under the regulatory system established by the Department, as previously discussed, preference was awarded commensurate with the carrying capacity of the base property during the qualifying priority period. As described by Wilcox, Lieurance understood that a practical way to grant the Easons 1,400 Class 1 AUM's would have been to change their dependent property survey records so that the AUM's would become part of their base property qualifications and tied to their continued control of their Class 1 base property. See 43 C.F.R. §§ 4110.0-5(k), 4115.2-1(e)(8) (1972); Garcia v. Andrus 692 F.2d 89, 93 (9th Cir. 1982); Mark X. Trask, 32 IBLA 395, 398 (1977); Fillmore Ranches, 30 IBLA 282, 285 (1977); Charles R. Kippen, 61 I.D. 452 (1954).

The Easons' dependent property survey records are not part of the record and there is no evidence that their base property qualifications were altered to include the 1,400 AUM's. 11/ Although Beverly

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11/ Appellants argue that Class 1 AUM's could have legally been granted under 43 C.F.R. § 4111.4-2 (1972). (SOR at 20-23.) There was no testimony that BLM considered issuing the 1,400 AUM's under the provision. The Mar. 3, 1973, "Notice of Final Advisory Board Recommendation and Decision of District Manager" (Ex. 8) neither mentions the regulation nor makes the kind of factual findings required to apply the regulation. See Max Tanner, 2 IBLA 183, 78 I.D. 134 (1971).

Eason testified that Gurr had told her the 1,400 AUM's were to be "added in to our old base Class 1 AUM's" (Tr. 268), there is limited evidence that the records were changed. In 1983, when seeking advice from the Regional Solicitor regarding the allocation of maintenance responsibility, Parker asked: "Should the 1,400 AUM's acquired by the BLM/Eason agreement be added to their active preference for the purpose of determining their share of maintenance, or should we use regular active preference by itself?" (Ex. B; Parker Dep. at 233-34.) He explained that, as District Manager, he could not treat the 1,400 AUM's as preference without first allowing a protest by the other allottees and holding a hearing: "The consequence of this would be substantial, if this was added in the Easons' base rights. Because they would have a larger base right and their portions would be greater." (Parker Dep. at 215.) Although steps might have been taken to qualify the 1,400 AUM's granted to the Easons as Class 1 AUM's based upon their ownership of base property, the AUM's do not qualify as Class 1 AUM's for a number of other reasons.

The grant of the 1,400 AUM's to the Easons was in settlement of a dispute regarding BLM's unauthorized appropriation of the Easons' water for the benefit of the Jackies Butte Unit by construction of impoundments which impeded the flow of that water, not allowing it to reach the point of diversion and use. During the initial negotiations with the Easons and others, BLM described the AUM's it was proposing to grant to the Easons as Class 1 AUM's, and this use of the term was undoubtedly a major source of the confusion regarding the nature of those AUM's.

[2] Because the AUM's do not fall within the definition of a Class 1 AUM, however, they are not Class 1 AUM's, regardless of what the parties may have called them. The AUM's of grazing allowance which do not appear on dependent property survey records as part of a Class 1 base property qualification are not Class 1 AUM's.

Looking to the source and the nature of those AUM's, we find the following attributes of those AUM's controlling when determining whether the AUM's are Class 1 AUM's:

1. The common thread running through the testimony of all who took part in the negotiations of the various contracts is the idea that what was being accomplished was an exchange of "water for grass."

2. The AUM's were not tied to a base property. They had no relationship to the carrying capacity of a base property.

3. The AUM's have priority over all other AUM's, including Class 1 AUM's in the event of reduction of AUM's in the Unit.

4. The AUM's can be unilaterally cancelled by BLM at any time. All BLM has to do to cancel the AUM's is to cease to use the water owned by the Easons and modify the catchment

structures to allow the flow of the water to the Easons' previous points of diversion and points of use.

5. No license fee is to be charged for the use of the forage.

When these contractual rights appurtenant to the 1,400 AUM's granted to the Easons are compared to those features of AUM's with a Class 1 designation, it is obvious that the Easons hold AUM's with all of the attributes of Class 1 AUM's and additional valuable attributes not found in the grant of Class 1 AUM's. The classification of the AUM's as Class 2 (exchange) AUM's will not nullify or decrease the value of those rights granted by the agreements entered into between the Easons, BLM and the other grazing users.

As Judge Sweitzer noted, a variety of subsequent documents also indicate that BLM and the Easons understood that the AUM's were not Class 1. (Decision at 6, 9.) By letter dated March 27, 1973, BLM informed the Easons that "[a]s agreed on February 26, 1973, you will be authorized 50 AU's and 350 AUM's trade of use within the Jackies Butte Unit in addition to your 434 AUM's Class I privileges." (Ex. 30.) For 1974 and 1975 the 1,400 AUM's were identified in the Easons' annual applications, preference statements, and billings as "trade of use." (Ex. 25.) In 1974 BLM issued, and Ralph Eason signed, an Allotment Management Plan listing the Easons as having 62 AU's (434 AUM's) active use, 54 AU's (94 AUM's) exchange of use, and an additional 200 AU's (1,400 AUM's) "trade of use" for a total of 316 AU's (1,928 AUM's). (Ex. 9, at 6-8.)

Apparently BLM computerized its grazing records sometime in 1975. The information printed on the "Grazing Preference Statement and Application" forms sent to Ralph Eason for 1976 and 1977 identify the 1,400 AUM's as "Exch/Use" and state: "Your Federal range qualifications remain as adjudicated--434 AUMs active use in the Jackies Butte Unit." (Ex. 25; Tr. 39-43.) The billing statement for 1978 noted that "Federal range qualifications remain as adjudicated--839 AUMs active use in the Jackies Butte Unit." (Ex. 25.) 12/ In 1983, BLM approved 102 additional AU's

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12/ Appellants claim that the preference statements and billings are "irrelevant" because the 1,400 AUM's were characterized as exchange-of-use in the computer-generated statements so that no charge would be calculated, as would have been the case if they had been listed as Class 1. (Reply at 11.) However, there was no testimony that erroneous bills would be issued by computer-generated billing statements. There was, however, testimony that a billing statement could be "prepared either by the computer in Denver or it can be hand prepared within the District Office." (Tr. 52.) Thus, any computer-generated billing error resulting from listing the 1,400 AUM's as Class 1 could have been avoided or corrected. Further, the 1974 and 1975 documents listing the AUM's as "trade of use" were not computer generated. The Easons were free to make handwritten changes on the computer-generated forms and may have done so in at least one instance. (Ex. 25; Tr. 48, 50, 52-54.)

for 2 weeks based upon the Easons' Class 1 preference of 719 AUM's, but did not grant equivalent additional AU's based upon the 1,400 AUM's granted by the February 26 Agreement. (Ex. 22; cf. Tr. 293.)

[3] Although documents sent between parties subsequent to signing an agreement are not conclusive as to the nature of rights acquired under the agreement, they are evidence of the parties' understanding of the agreement. With regard to the February 26 Agreement, Judge Sweitzer correctly accepted the subsequent documents as evidence that the parties understood that the 1,400 AUM's were not Class 1. (Decision at 8-9 (quoting 17A Am. Jur. Contracts § 357 (1991)).) Appellants argue that they had no reason "to object to how BLM characterized the 1,400 AUM's" because the billing statements note that "[t]he AUMs shown on this license are for administrative purposes only." (Reply at 16.) Although the descriptions of the AUM's were not legally binding, the documents did serve to inform Appellants that BLM did not identify the 1,400 AUM's as Class 1 on BLM records. More significantly, the 1983 authorization for additional grazing did not give credit for the 1,400 AUM's. Consequently, the documents evidence that BLM and the Easons did not consider the 1,400 AUM's to be Class 1.

Shortly after BLM had acquired the Skull Creek Pasture in an exchange with the State of Oregon, Ralph Eason signed an MOA confirming that he held 719 AUM's in the Jackies Butte Common Allotment and 120 AUM's in the Jackies Butte Winter Range Allotment. (Ex. 10; Answer at 11.) The Appellants charge that "BLM deliberately misinterprets the MOA and the events surrounding the signing thereof." (Reply at 7.) They assert that in a January 16, 1978, letter to BLM, they "noted that the MOA made no reference to the 1,400 AUMs" and "advised the BLM that they assumed that the BLM believed the Agreement was self-executing, i.e., a license." (Reply at 9.) Appellants argue that, by signing the MOA after receiving the letter, "BLM necessarily agreed that the Agreement was a license" and therefore the omission of the AUM's from the MOA "does not mean that the parties did not intend for the 1,400 AUMs to be Class 1 AUMs." (Reply at 9-10.)

The argument misrepresents the Easons' letter. The letter is a cover letter returning both the MOA and the Easons' annual application for a grazing license. See Tr. 51-52; 43 C.F.R. § 4115.2-1(a) (1972). The Easons first pointed out that "the right to which we are entitled pursuant to our agreement of February 26, 1973 is not reflected in the prospective grazing scheme or the application." (Ex. 11 (emphasis supplied).) They then stated: "We assume you believe the agreement of February 26, 1973 is self-executing, a separate reference to it or the right conferred by it need not be reflected in the application and for this reason the application does not do so." Id. (emphasis supplied). Although "license" is not defined in the regulations, the term has long been used to refer to an annual authorization to graze a specific number of animals in a specified area during a grazing season. See Tr. 35-36, 52-53; Monroe Dep. at 46-47; Parker Dep. at 138; 43 C.F.R. § 501.1(c) (1940); 43 C.F.R. § 4112.3-1(a) (1972); E. L. Cord, 64 I.D. 232, 238 (1957); Alford Roos, 57 I.D. 8, 10 (1938). The Easons' cover letter does not assert that the February 26

Agreement is a "license" and "self-executing" does not mean the same as "license." See, e.g., United States v. Locke, 471 U.S. 84, 100 (1985). On its face, the assertion that the February 26 Agreement was "self-executing" did not pertain to the MOA. Rather, it was a statement that the Easons' annual license did not need to include the 1,400 AUM's in order to utilize them without trespass. 13/

The MOA provides: "It is hereby agreed that the carrying capacities of these State lands be converted to active Class 1 privileges as stated in the policy between the two agencies dated January 9, 1974. The above named licensee's past privileges have been." (Ex. 10.) It lists the Easons as having had 314 AUM's Active Use in the Jackies Butte Common Use Allotment and 120 AUM's in the Winter Allotment and states that "[i]t is agreed that the above privileges be changed to" 719 AUM's in the Common Use Allotment and 120 AUM's in the Winter Allotment. Id. Whatever the Easons meant by the "self-executing," they neither described the 1,400 AUM's as Class 1 nor asserted that they should have been added to their 719 Class 1 AUM's. Consequently, the fact the AUM's were not included indicates that the parties did not consider the 1,400 AUM's to be Class 1.

[4] The legal question raised by the provision that "this is a trade of use and no license fee will be charged" is whether it was within the authority granted the Department by the Taylor Grazing Act. The Act appears to condition a grazing permit "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." The regulations similarly provided that "[f]ees will be charged for the grazing of all livestock on public lands at a rate per animal unit month, except that no fee will be charged for a free-use license." 43 C.F.R. § 4115.2-1(k) (1972). As the parties note, however, the regulations allow exchange-of-use agreements in which grazing rights are granted for Federal lands in exchange for BLM "management and control of [interspersed] non-Federal land" without payment of grazing fees. 43 C.F.R. § 4115.2-1(h) (1972). The longstanding existence of the regulation implies that it is within the Department's authority to exempt a grazing authorization from "the payment annually of reasonable fees" in exchange for other value received. See 20 Fed. Reg. 9912, 9914 (Dec. 23, 1955). 14/

13/ As Appellants acknowledge elsewhere, the obvious reason the application did not mention the 1,400 AUM's is that the Oregon State Office's Feb. 28, 1977, memorandum had instructed the local BLM officials not to issue a license based upon the agreement. (Ex. I; Parker Dep. at 135-38; see Reply at 13 n.16.) It is equally apparent that BLM did not respond after receiving the letter because the memorandum also directed that a trespass action not be initiated. (Ex. I.)

14/ Exchange-of-use arrangements have been made in a variety of circumstances. See, e.g., Harold J. Heath, 73 IBLA 147, 148 (1983) (exchange-of-use license issued for Rats Nest Allotment for private land and state lease in Shares Basin Allotment); David Abel, 78 I.D. 86, 89, 98-99 (1971) (oral agreement to "trade the use of land which he owns in the Central-K-Henry allotment" for use of land in the South-K-Henry allotment and "the use of a reservoir which he owns in the North-K-Henry allotment for a license to graze 10 cattle for 8 months in the South-K-Henry allotment").

As previously stated, there is no reason to doubt that the Easons initially intended to obtain Class 1 AUM's and that BLM considered granting Class 1 AUM's. The 1,400 AUM's the Easons bargained for and received do not arise from the Easons' base property qualifications and have characteristics which preclude them from being Class 1. They will continue so long as BLM uses the water, subject to Easons' water rights for grazing within the Jackies Butte Allotment; they are not subject to regulations governing reductions in Class 1 usage, but are "the last allowance to be cut or diminished;" and they are not subject to a license fee. Testimony by Wilcox, Perry, and Beverly Eason establishes that the Easons sought to obtain these features for the AUM's they were to receive. By agreeing to them, neither BLM nor the Easons intended for the AUM's to be Class 1. To hold, as Appellants suggest, that the AUM's are Class 1 despite the features negotiated by the parties (SOR at 6 and n.6; Reply at 20 n.26) would be an exercise in pure nominalism. Rather, the parties arrived at an arrangement which they denominated in the February 26 Agreement, and subsequently referred to as, a "trade of use." 15/ Judge Sweitzer's conclusion that the 1,400 AUM's are not Class 1 is affirmed.

VII. Maintenance

The May 30, 1984, BLM Decision assigns the Easons responsibility for their aliquot share of the cost of maintenance of the surface water development structures within the Jackies Butte Unit, but agrees to pay their share of the cost of maintenance of the structures in the watersheds on which they hold water rights as an obligation arising from the February 26 Agreement. The Easons contend that the agreement requires BLM to pay their share of maintenance for all of the water structures and developments in the Jackies Butte Unit, including the China Gulch well and pipeline system, which are groundwater-related structures, and for structures and developments outside the watersheds in which they hold water rights. 16/

15/ Appellants suggest that "a review of the whole clause, `this is a trade of use and no license fee will be charged * * *' indicates that the phrase `trade of use' denotes an alternative form of user fee (i.e., other than money), as opposed to a separate class of AUMs." (Reply at 4.) The argument derives from Judge Sweitzer's finding that "trade of use" could "as easily be construed as an alternative form of user fee." (Decision at 8.) His conclusion was that, because "trade of use" could describe a user fee, it did not necessarily identify a class of AUM's and, therefore, the Class 1 issue could not be resolved based upon the plain language of the agreement. He was correct. The clause is in the conjunctive. Use of the Easons's water as a "user fee" neither precludes the AUM's from being described as a "trade of use" nor requires that they be Class 1.

16/ In their Reply, Appellants claim that BLM should not have assigned them maintenance responsibility for areas outside the Skull Creek Pasture based on their 719 AUM active preference, because 405 of those AUM's are for the Skull Creek Pasture. (Reply at 29-30.) They acknowledge they have not previously raised the issue, but state they "were unaware of this issue until recently" and that the matter is "reprehensible" and "demonstrates that the BLM has a history of acting in an arbitrary and capricious manner towards the Easons." Id. at 30 n.35. Appellants do not explain why they

For convenience, we will set out the provision in the February 26 Agreement giving rise to this controversy. Designating BLM as the first party and the Easons as the second, it provides:

> (1) That the SECOND PARTIES agree to permit the FIRST PARTY to construct and maintin [sic], at its own expense, as many water structures and developments as may be necessary for proper management of the Jackies Butte Unit on which the SECOND PARTIES control the water right. That the water rights of the SECOND PARTY are on and adjacent to the Jackies Butte Unit, Vale District, and the FIRST PARTY wishes to construct and maintain the water structures and developments as may be necessary for proper management on drainages to improve and benefit the Jackies Butte Unit.

Appellants' arguments about the provision are inconsistent. They quote a portion of the first sentence and maintain that it is unambiguous and "BLM must maintain all `water structures and developments.'" (SOR at 30; Reply at 21.) Although Appellants do not identify any specific word or phrase, they also argue that "[t]he Agreement is ambiguous with respect to whether it applies to all water structures and developments on the Jackies Butte Unit, or whether it applies only to those water structures and developments * * * which are located within the watershed on which the Easons own water rights." (SOR at 34.) Maintenance is mentioned only in the first paragraph of the agreement. Its specific words and phrases cannot be both ambiguous and unambiguous. If the terms are plain and unambiguous, there is no basis on which to refer to extrinsic evidence to construe its meaning. 17A Am. Jur. Contracts § 337 (1991).

We do not agree with the Easons' conclusion that the first sentence is ambiguous, but come to a conclusion very close to that advanced by the Easons. The first sentence identifies the action the Easons took by signing the agreement, i.e., they "agree[d] to permit" BLM to undertake certain activities. It defines those activities which BLM is contemplating, i.e., BLM would "construct and maintain * * * water structures and developments as may be necessary for proper management of the Jackies Butte Unit" and then recognizes that the Easons' control water rights in the Jackies Butte Unit. Id. (emphasis supplied). The second sentence recognizes and accepts the fact that the Easons' ownership of the water being diverted and used by

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fn. 16 (continued)
believe the calculation was erroneous and "reprehensible." Their assertion that BLM was arbitrary and capricious appears to rest upon a belief that "nowhere in the other Jackies Butte users' cooperative agreements is it reflected that they were assigned maintenance responsibility based upon their active preference." Id. at 29 n.33. The assertion ignores clear evidence that BLM assigned maintenance on the basis of active grazing preference. (Tr. 22, 24, 26-27; Monroe Dep. at 27; Ex. 29, Attach. B.) The issue was not among those stipulated by the parties, and thus has not been addressed by BLM.

BLM in the Jackies Butte Unit arises from the Easons' appropriation of that water both "on and adjacent to the Jackies Butte Unit." It also recognizes that BLM has the right to "construct and maintain the water structures and developments as may be necessary for proper management on drainages to improve and benefit the Jackies Butte Unit" and it will not be limited by the terms of the agreement to structures and developments that will benefit that portion of the Unit containing the drainages feeding the water to the Easons' water rights. The dominant phrase running throughout the first paragraph (and the agreement as a whole) is "the Jackies Butte Unit."

The Easons' power to restrict the construction of water structures derived from their water rights, and they did not have the authority to grant (or deny) permission to construct and maintain water structures and developments that would appropriate water other than the water subject to their water rights. The agreement expresses recognition of the fact that the Easons held water rights on only a portion of the Jackies Butte Unit. The language of paragraph (1) was intended to recognize BLM authority to construct any structure or facility to impound or divert the Easons' water for any purpose that will benefit the Unit as a whole, not just that portion of the Unit that is subject to the Easons' water rights. Recognizing the authority to construct structures anywhere in the Unit, it follows that agreement also provides that water structures and facilities will be constructed and maintained at no cost to the Easons (at least as far as their 1,400 AUM's are concerned).

We temper our judgement with the knowledge of the scope of development that the parties had in mind when they entered into the agreement. As mentioned earlier, in the 1960's the Jackies Butte Unit had more grass than water. The Bureau became aware that the Easons held water rights on drainages in the Jackies Butte Allotment in the 1960's while working on plans for water development for the Unit. (Tr. 76-78, 83.) The Easons initially filed a complaint with the Oregon State Engineer in 1965 and by 1967 they were seeking additional grazing in compensation for use of the water. When the final stages of the agreements were being negotiated, BLM was in the final stages of drafting a planning document, which included a detailed listing of the water development facilities and structures it then deemed necessary for optimum sustained yield use of the Jackies Butte Unit. That planning is set out in the 1974 document entitled "Allotment Management Plan, Jackies Butte Unit." (Ex. 9.) From the testimony of BLM employees responsible for that planning, the users who would benefit from the improvements, and the Easons, whose water was necessary to carry out the planned water development, and from the Exhibits presented during the hearing, we conclude that the identity of the facilities and structures deemed necessary when the agreements were signed was well known. This is reflected in the detail of the provision of the February 26 Agreement calling for the phasing in of the AUM's granted to the Easons. Our conclusion regarding the facilities and structures to be constructed and maintained without cost to the Easons is limited to those structures and facilities listed in the "Allotment Management Plan, Jackies Butte Unit."

We further temper our holding in recognition that the agreement is only applicable to the 1,400 AUM's subject to the February 1973 Agreement.

The balance of the AUM's assigned to the Easons are Class 1 AUM's and the Easons are responsible for their aliquot share of the maintenance costs, based upon those AUM's, and for their proportionate share of the cost of maintenance of other facilities and structures. 17/

Judge Sweitzer's finding that the first paragraph of the agreement is ambiguous is reversed. His findings that the agreement does not require BLM to pay the Easons' share of maintenance for groundwater-related structures and developments and for structures and developments outside the watersheds where they hold water rights are reversed to the extent inconsistent with this Decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the April 22, 1994, Decision by Administrative Law Judge Sweitzer is affirmed in part as modified, vacated in part, and reversed in part.

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James P. Terry
Administrative Judge

I concur:

_____
R.W. Mullen
Administrative Judge

_____
17/ Beverly Eason recognized this responsibility when she stated that the Easons were responsible for their share of fence maintenance costs based upon their total AUM ownership, including the 1,400 AUM's. (Tr. at 292.